Flamingo Hilton-Reno, Inc. *and* UBC Western Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 32–CA–14378

May 31, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On October 31, 1995, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent and the General Counsel each filed exceptions and supporting briefs, and the Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified[3] and to adopt the recommended Order as modified and set forth in full below.

AMENDED CONCLUSIONS OF LAW

Substitute the following paragraphs for Conclusion of Law 5 and renumber the subsequent paragraph.

''5. By refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Respondent has violated Section 8(a)(5) and (1) of the Act.

''6. By closing its bakery and laundry operations, transferring bargaining unit work outside the unit, laying off employees, granting wage increases and making other unilateral changes in employees' terms and conditions of employment without notifying and bargaining on request with the Union, and by refusing to discuss grievances with the Union, the Respondent has violated Section 8(a)(5) and (1) of the Act.

''7. By failing and refusing to provide the Union with requested information necessary for the purposes of collective bargaining and the investigation and discussion of grievances, the Respondent has violated Section 8(a)(5) and (1) of the Act.

''8. By coercively interrogating employees regarding their union activity, the Respondent has violated Section 8(a)(1) of the Act.

''9. By threatening employees with reprisals for engaging in union activity, the Respondent has violated Section 8(a)(1) of the Act.

''10. By searching an employee's locker, admonishing the employee that continued union activity could result in adverse repercussions, and directing the employee to confine distribution of union literature to locations outside the Respondent's premises, the Respondent has violated Section 8(a)(1) of the Act.

''11. By telling employees that their efforts in selecting the Union as their collective-bargaining representative were futile and that it would be several years before the Union would be able to help them, the Respondent has violated Section 8(a)(1) of the Act.''

AMENDED REMEDY

In addition to those remedies recommended by the judge,[4] the Respondent shall be ordered to take the following affirmative action. Having found that the Respondent unlawfully closed its laundry and bakery operations, transferred the work to the Reno Hilton, and laid off certain of its unit employees without providing the Union notice or an opportunity to bargain, we shall order the Respondent to restore the status quo ante by reopening its laundry and bakery, restoring the work it transferred to the Reno Hilton, offering the unit employees affected by these actions immediate reinstatement to their former positions, and making those employees whole for any loss of earnings and other benefits suffered, in the manner set forth in the remedy section of the judge's decision. The Respondent may, however, introduce previously unavailable evidence, if any, at the compliance stage of this proceeding, to demonstrate that the reinstitution of those operations would be unduly burdensome. *Lear Siegler, Inc.*, 295 NLRB 857 (1989).

We have also modified the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[1] No exceptions were filed to the judge's dismissal of the allegation that Supervisor Alfredo Eyzaguierre violated Sec. 8(a)(1) of the Act by interrogating an employee, Donna, about why she was wearing a ''Union Yes'' button.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We have carefully reviewed the judge's decision with respect to the General Counsel's allegation in his amendment to complaint that the Respondent violated Sec. 8(a)(1) of the Act by constraining its employees to reveal their pro- or anti-union sympathies by soliciting employees to sign ''Consent To Be Photographed'' and ''Consent to Use Video'' documents in order to appear in a videotape communicating the Respondent's position regarding the Union's organizing campaign. We find that this issue merits further consideration. Accordingly, par. 6(f) of the amendment to complaint is severed and is subject to further consideration by the Board.

[4] Backpay for the unilateral changes other than the layoffs shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Flamingo Hilton-Reno, Inc., Reno, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with UBC Western Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL–CIO as the exclusive collective-bargaining representative of the unit employees.

(b) Closing parts of its operations, transferring bargaining unit work outside the unit, laying off employees, granting wage increases, and making other unilateral changes in employees' terms and conditions of employment without notifying and bargaining on request with the Union, and refusing to discuss grievances with the Union.

(c) Failing and refusing to provide the Union with requested information necessary for the purposes of collective bargaining and the investigation and discussion of grievances.

(d) Coercively interrogating employees regarding their union activity.

(e) Threatening employees with reprisals for engaging in union activity.

(f) Searching employees' lockers, admonishing employees that continued union activity could result in adverse repercussions, and directing employees to confine distribution of union literature to locations outside the Respondent's premises.

(g) Telling employees that their efforts in selecting the Union as their collective-bargaining representative would be futile and that it would be several years before the Union would be able to help them.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time hotel employees employed by Respondent at its 225 North Sierra Street facility in Reno, Nevada; excluding all gaming department employees, engineering department employees, general and administrative department employees, marketing department employees, entertainment department employees, managerial and confidential employees, professional employees, employees represented for collective bargaining by other labor organizations, guards and supervisors as defined in the Act.

(b) Reopen its laundry and bakery operations, restore the work it transferred to the Reno Hilton, and offer the unit employees affected by the Respondent's unilateral action immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the unlawful action, in the manner set forth in the amended remedy section of this decision.

(c) On request, rescind all unilateral changes made by the Respondent in the employees' terms and conditions of employment and make whole the unit employees for any loss of earnings and other benefits suffered as a result of those unilateral changes in the manner set forth in the amended remedy section of this decision.

(d) Furnish the Union the information it requested since November 2, 1994.

(e) On request, discuss with the Union all grievances of unit employees, including all those grievances it previously failed to discuss.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Reno, Nevada, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 11, 1994.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that paragraph 6(f) of the amendment to complaint relating to the solicitation of employee consent to appear in the Respondent's campaign videotape is severed and shall be subject to further consideration by the Board.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
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> To form, join, or assist any union
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> To bargain collectively through representatives of their own choice
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> To act together for other mutual aid or protection
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> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with UBC Western Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL–CIO as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT close parts of our operations, transfer bargaining unit work outside the unit, lay off employees, grant wage increases, or make other unilateral changes in employees' terms and conditions of employment without notifying and bargaining on request with the Union, and WE WILL NOT refuse to discuss grievances with the Union.

WE WILL NOT fail and refuse to provide the Union with requested information necessary for the purposes of collective bargaining and the investigation and discussion of grievances.

WE WILL NOT coercively interrogate employees regarding their union activity.

WE WILL NOT threaten employees with reprisals for engaging in union activity.

WE WILL NOT search employees' lockers, admonish employees that continued union activity could result in adverse repercussions, or direct employees to confine distribution of union literature to locations outside our premises.

WE WILL NOT tell employees that their efforts in selecting the Union as their collective-bargaining representative would be futile and that it would be several years before the Union would be able to help them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time hotel employees employed by us at our 225 North Sierra Street facility in Reno, Nevada; excluding all gaming department employees, engineering department employees, general and administrative department employees, marketing department employees, entertainment department employees, managerial and confidential employees, professional employees, employees represented for collective bargaining by other labor organizations, guards and supervisors as defined in the Act.

WE WILL reopen our laundry and bakery operations, restore the work we transferred to the Reno Hilton, and offer the unit employees affected by our unilateral action immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the unlawful action, less any net interim earnings, plus interest.

WE WILL, on request, rescind all unilateral changes we made in the employees' terms and conditions of employment and WE WILL make whole the unit employees for any loss of earnings and other benefits suffered as a result of the unilateral changes made by us, plus interest.

WE WILL furnish the Union the information it requested since November 2, 1994.

WE WILL, on request, discuss with the Union all grievances of unit employees, including all those grievances we previously failed to discuss.

FLAMINGO HILTON-RENO, INC.

George Velastegui, Esq., for the General Counsel.
Dawn Patrice Ross, Esq. (Morgan, Lewis & Bockius), for the Respondent.
Timothy Sears, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Oakland, California, on June 20 and 21, 1995. The charge was filed on November 11, 1994, by UBC Western Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. On March 24, 1995, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing alleging violations by Flamingo Hilton-Reno, Inc. (the Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Amendments to the complaint were issued by the Regional Director on April 7 and May 26, 1995. The Respondent's answers to the complaint and amendments to the complaint, duly filed, deny that the Respondent has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel, counsel for the Respondent, and counsel for the Union. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Nevada corporation with its principal place of business located in Reno, Nevada, where it is engaged in the business of operating a hotel and casino. In the course and conduct of its business operations, the Respondent annually receives gross retail revenues in excess of $500,000, and purchases goods valued in excess of $5000 which originate outside the State of Nevada. It is admitted, and I find, that at all times material the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues raised by the pleadings are whether the Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to confer and discuss matters with the Union between the date of the representation election and the date of the Board certification; whether the Respondent violated Section 8(a)(1) of the Act by certain instances of alleged threats and interrogation; and whether the Respondent violated Section 8(a)(1) of the Act by asking employees to authorize their participation in a precompany election campaign video.

B. *The Facts*

Following a representation election in Case 32–RC–3855, held on August 18, 1994, the Union was certified by the Board on February 22, 1995, as the exclusive collective-bargaining representative of the employees in the following unit:

> All full-time and regular part-time hotel employees employed by Respondent at its 225 North Sierra Street facility in Reno, Nevada; excluding all gaming department employees, engineering department employees, general and administrative department employees, marketing department employees, entertainment department employees, managerial and confidential employees, professional employees, employees represented for collective bargaining by other labor organizations, guards and supervisors as defined in the Act.[1]

On May 9, 1995, the Board issued a decision in a related case, Case 32–CA–14578 (reported at 317 NLRB 361), ordering the Respondent to bargain with the Union pursuant to the aforementioned certification. Currently, this decision is on appeal by the Respondent to the Ninth Circuit Court of Appeals. In that proceeding the Respondent raised the issue of the Union's alleged noncompliance with certain Nevada State Statutes as a reason justifying its admitted refusal to bargain with the Union, on request, following the certification. In the instant matter the Respondent has attempted to relitigate this and other issues which were previously litigated and rejected by the Board in its aforementioned decision, and the Respondent was precluded, on the basis of res judicata, from relitigating such matters here.

The facts in the instant case involve alleged unlawful conduct which occurred prior to the February 22, 1995 certification of the Union.

On August 29, 1994, some 10 days following the election, the Union requested that the Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees. The Respondent refused to do so or to deal with the Union in any respect and thereafter engaged in conduct which is alleged in the complaint to be violative of Section 8(a)(5) of the Act. In October and November 1994, it laid off certain of its unit employees; on or about November 30, 1994, it closed its hotel laundry and laid off certain of its unit laundry employees and transferred unit work to another entity, the Reno Hilton, which entity has the same corporate parent as the Respondent; on or about January 1995, it closed its hotel bakery and laid off certain of its unit bakery employees and transferred unit work to the Reno Hilton; since on or about August 18, 1994, the date of the representation election, it has granted annual discretionary pay raises to unit employees; and since on or about September 9, 1994, and on various dates thereafter, including November 2, 11, and 16, 1994, it has refused to process or discuss with the Union grievances filed by the Union concerning unit employees Don Williams, Sherwood Kirk, Henry Sauseda, Michael Sloan, Berta Recinos, Chalklet Lamar, Lorraine Lombardi, Doreen Hoff, and Marcos Castaneda who, apparently, have been effected by the foregoing unilateral changes.

[1] Approximately 300 employees are included in the collective-bargaining unit.

Further, since on or about November 2, 1994, and continuing thereafter, the Respondent has refused to furnish the Union with the following requested information: certain specified information relating to the aforementioned grievances of the various named employees; the full names, addresses, telephone numbers, wage rates (and, if applicable, tip compliance rate), job classifications, work schedules and departments to which unit employees are assigned; information regarding the effects of the aforementioned closing of the hotel laundry; information regarding the layoff of unit employees; and information regarding the effects of the aforementioned closing of the hotel bakery. This information, insofar as the record discloses, is relevant to the foregoing unilateral changes instituted by the Respondent.

The Respondent admits that, in effect, it continued to conduct its day-to-day business operations as if the Union were not the representative of the unit employees, and refused to provide the Union with the requested information or to discuss unit employees' layoffs or grievances with the Union. Thus, the Respondent is testing the certification of the Union by its appeal to the Ninth Circuit Court of Appeals, and until the matter is resolved in that forum it will continue to operate its business and make necessary changes in the terms and conditions of employment of the unit employees as if they were unrepresented by any labor organization. Moreover, the Respondent has not presented any evidence indicating that its refusal to deal with the Union as specified above, and its further refusal to furnish the Union with the requested information, are not matters encompassed by its obligation to consult and deal with the Union regarding the unilateral changes it admittedly made prior to the certification.

The complaint also alleges that prior to and shortly after the August 18, 1994 election, the Respondent engaged in various violations of Section 8(a)(1) of the Act.

Silvia Cruz has worked for the Respondent for 2 years. She is a bus person in the buffet. About 2 weeks before the election she began wearing a campaign button in support of the Union. It said, ''Union Yes.'' Food and Beverage Supervisor Ed Hsiao talked to her about this. Thus, according to Cruz, Supervisor Hsiao happened to be passing by when a buffet cook pointed out Cruz' button to Hsiao, saying, ''Look, [Cruz] is wearing a union button.'' Hsiao, according to Cruz, then said to her, ''[D]on't use it, not to use that button . . . because I could get into a lot of trouble. He tell me don't wear it, that, because you get too many problems.'' Cruz asked Hsiao why employees, and apparently supervisors, including Hsiao, were permitted to wear ''Union No'' buttons. He replied that they could wear the procompany buttons because they worked for the Company and the Company was not in favor of the Union. Although it was Cruz' understanding that employees were permitted to wear such prounion buttons, nevertheless this comment by her supervisor caused her to remove the button she had been wearing.

Cruz testified that about 2 weeks after the election, during the course of a daily prework meeting in the buffet area, Supervisor Hsiao complimented the group of four or five employees about their work. One of the employees replied that the buffet employees worked very hard and asked, according to Cruz, ''Where is the money and where is the Union.'' Hsiao replied that the employees had good jobs and that the Union could not do anything for them; he said that if the Company wanted to lay them off quickly the Union could not do anything about it and the employees could end up without work; and he further stated that it would take about 2 or more years for the Union to get in and be able to do something for the employees, and that the Company could fire the employees at any time and the Union could do nothing for them.

Supervisor Hsiao has worked for the Respondent for 14 months. Hsiao testified that he understood the Respondent's established policy about the wearing of union buttons during the course of the campaign, namely, that employees were permitted to wear either procompany or prounion buttons on their uniforms; supervisors were instructed to wear procompany buttons, and if an employee asked for one they were to remove the button and hand it to the employee. According to Hsiao, Scott Bridges, assistant director of food and beverage, instructed the supervisors about this policy during staff meetings; however, according to Hsiao, Bridges did not instruct the supervisors that they should not approach employees and talk to them about union matters. Hsiao testified that he had no conversation with Cruz or any other employee prior to the election regarding the wearing of buttons or about any other union issue or topic, and denied that he told any employee that they shouldn't wear a button, or that they might be in trouble if they wore a button.

Hsiao further testified that about 2 weeks after the election he happened to overhear a group of between five and seven buffet employees, who were gathering for the daily preshift meeting, talking about union matters. The employees were speculating about who might become the shop steward and how much of a wage increase they might expect as result of union representation. Hsiao, who was on his way to get a cup of coffee prior to the meeting, made a passing comment to them as follows: ''The ruling from the Labor Board is not here yet, it takes time.'' Hsiao denied that he said anything else. The employees, according to Hsiao, stopped talking when he made this remark, and made no reply. Hsiao denied that he said it would take 2 years for the Union to come in; he only said it would take time. He learned this, he said, from his wife, a postal worker who was a union member, and had not received such information from Respondent's management.

Hsiao also denied that anyone prepared him for his testimony prior to the hearing, but the Respondent's attorney stipulated that ''Mr. Hsiao and I have had discussions about the types of questions he might be asked here today.''

Byron Gonzalez worked for the Respondent for a year and a half as a bus person in the coffeeshop, but at the time of the hearing he was no longer employed by the Respondent. He wore a ''Union Yes'' button about a month before the election. Gonzalez testified that Emerson Kimball, coffeeshop supervisor, came up to him and asked, ''Byron, why you [sic] wearing that union button.'' Byron didn't reply. He did not immediately remove the button, but he decided not to wear it thereafter because he ''felt fear'' in the way Kimball, who had raised his voice, had spoken to him. Up to the time of the election he saw employees wearing ''Union Yes'' buttons and other employees wearing procompany buttons.

Supervisor Kimball, who is still employed by the Respondent but who was on vacation at the time of the hearing, did not testify in this proceeding.

Gonzalez testified that 1 day after the election he overheard Alfredo Eyzaguierre, food and beverage shift supervisor, ask a new female bartender, Donna, why she was wearing a ''Union Yes'' button. Donna replied that she was wearing the button because she liked it.

Supervisor Eyzaguierre, who is currently employed by the Respondent, did not testify in this proceeding.

Herlinda Carvajal is a maid in the housekeeping department. She is currently on disability. Carvajal testified that she helped her coworkers organize and handed out propaganda for the Union. She was a member of the employee committee, and distributed literature in the cafeteria and at the lockers during lunch and after work. In about early June, a security officer named Theresa Pierce talked to her in the women's locker room. Pierce said she was looking for Carvajal because someone had reported that Carvajal was causing a lot of problems by passing out literature to the employees, and Carvajal ''had a bad record downstairs.'' Pierce asked Carvajal for the literature and requested that she open her locker. Carvajal asked why, and Pierce replied that the papers that she was sent to confiscate were in Carvajal's locker.

About that time, as Pierce was insisting that Carvajal open her locker, Irma Herbert, housekeeping manager and Carvajal's supervisor, entered the locker room. Pierce told Herbert that ''this is the gal that has been causing the problems with the Union.'' Carvajal then opened her locker and Pierce inspected it but found no union literature inside. Other security guards were apparently waiting outside the locker room and Pierce told them that there wasn't anything in the locker. Then she told Caravajal that she was sorry, and left. Supervisor Herbert remained and advised Carvajal that she ''didn't have to hand out propaganda inside the casino, and she should go do it outside on the street.'' Herbert suggested that Carvajal conduct her union activity where nobody would see her. Carvajal asked Herbert why she could not openly engage in such activity, as she was respecting the rule to do it off work time. Carvajal testified that she discontinued distributing leaflets until after the election, because she became frightened. She denied that she had distributed such literature during working time.

Carvajal testified that she had been told by supervisors, apparently during preshift meetings, that employees could distribute literature in the cafeteria and the locker room during nonworking time.

Neither Pierce nor former Housekeeping Manager Herbert, who is no longer employed by the Respondent, testified in this proceeding. Portions of Herbert's affidavit were received in evidence, and generally confirm the foregoing testimony of Carvajal regarding the locker room incident. In addition the affidavit states as follows:

> I believe I told [Carvajal] to hand out her union propaganda on the street or do it more secretly. I told her that because I wanted her to stay out of trouble. . . . I do not recall if [Carvajal] told me that the bosses told her she could pass out the leaflets during lunch and breaks and in the locker room or cafeteria. I was aware that employees were allowed to solicit and distribute literature in the cafeteria during lunch and breaks. I was not sure whether they could in the locker room.

The complaint alleges that the Respondent has violated Section 8(a)(1) of the Act by soliciting employees to participate in an antiunion/procompany videotape utilized as campaign propaganda by the Respondent and shown to the employees during mandatory meetings 24 hours prior to the election. The video bears the title ''25th Hour.''

Mary Bryant is director of casino marketing for the Respondent. Bryant testified that she has been involved in the preparation of other videotapes or photographic media for the Respondent, and has produced hotel tour videos and fire safety videos and advertising brochures. It is her practice to obtain consents from individuals who appear in the aforementioned videos and brochures, and she continued this practice with regard to the video in question. Employees were advised that they would have to sign written consent forms if they wished to appear in the video.

Bryant directed the staff of about 20 department managers to let her know the names of unit employees who appeared to be procompany and who would perhaps like to get their message out to the employees. The managers gave Bryant the names of various employees and Bryant interviewed them and asked if they wanted to volunteer to be in the video. She told the employees to just say anything they felt like saying, and their remarks were spontaneous and unscripted. They were asked to talk about their work experiences with the Company and to give their views regarding the upcoming election. However, only seven or eight of these employees appeared in the final product, the decision in this regard being dependent on the quality of the taping and the employee's presentation. Regarding the speaking parts, Bryant testified as follows:

> Most of [the employees] just said that they had been happy at the Flamingo, had been happy with their treatment there, and that they didn't feel they needed a third party to intervene.

Bryant went on to describe the videotape as follows:

> As I say, I haven't seen it in a while, but it was basically talking about the hotel and showing the employees, a lot of the employee shots were kitchen workers, maids, food servers, porters, people just doing their jobs—some of them were waiving at the camera, some of them were just doing their jobs—dishwashers. It talked about some of the benefits of the hotel. It was just basically a promotional, you know, a pro-hotel type of message . . . it talked about some of the legal problems that the Carpenters Union has had in the past . . . it talked a lot about the problems the union has had and about the positive thoughts about the hotel.

Regarding the consent forms for the nonspeaking roles, the supervisors were asked to watch the video and identify the employees from their respective departments, and to have the employees sign the forms if they wanted to remain in the video; otherwise they would be deleted. The consent forms, after being signed by the employees, were then passed on to human resources.

According to Bryant, the consent forms are to protect the Company, and it is customary for her to require the use of such consent forms for all the videos and promotional items

that she produces. The forms were not utilized in the instant matter simply because of the nature of this particular video.

The final videotape was about 20 minutes in length. A Spanish and English version of the video was produced. About 5 to 7 minutes of the film consists of employees giving their opinions regarding the election campaign. The overall message of the video was clearly antiunion and was designed to persuade employees to vote against union representation. Mention was made of alleged corruption within the Union and there were some segments of violence associated with strikes. The last few minutes of the video consisted of a song, and during the song a montage of various workers were smiling and waving at the camera.

John Sommer is the Respondent's director of human resources. Sommer testified that the opening frame of the video contains a written disclaimer to the effect that the employees depicted in the video should not be viewed as being either in favor of the Union or against the Union. The video contains scenes throughout the hotel of customers and employees interacting. It includes employees from all departments of the hotel and casino, not just the bargaining unit employees; many of the employees who signed consent forms were not bargaining unit employees. It also includes supervisors and upper level management. It gives information regarding unions in general and some specific information regarding the Union here. And it concludes with a minute or two of random shots throughout the hotel of employees who are working and/or waiving at the camera superimposed over a ''jingle'' that emphasizes the concept of teamwork and of Flamingo employees working together as a team and being the best that they could be. The ''jingle'' makes no reference to any union.

Sandra Goldman is executive assistant manager. Goldman said that she approached several employees who had expressed support for the Company and said that the hotel was doing a video that would be presented to all the employees at a meeting prior to the election. She asked if they would be willing to participate. She said it was going to be a ''ra-ra pro-company, I'm happy working at the Flamingo'' video.

Scott Bridges is assistant director of food and beverage. He testified that at regularly scheduled preshift meetings over a 2-week period he had the opportunity to address all of the approximately 300 food and beverage employees. With regard to the video, he advised them as follows:

> I basically informed the employees that we would be filming a video, it would be filmed on property. We had two basic parts of the video, one part of the video would be employees who had, or who wanted to voice their opinion in regards to pro-company issues, and the second part of the video would be just general panning shots around the property. And if anybody wanted to volunteer for the first part they could, they needed to contact Mary Bryant.
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> . . . .
>
> Basically I informed them that it was going to be a pro-company video that would be shown to all the employees, just prior to the election.

Employees who wanted to volunteer for speaking parts were told to contact Mary Bryant. Employees were also told, prior to the filming, that if they had any concerns about being in the panning shots they should not be in the area when the cameras were videotaping the employees in the performance of their work. Further, the employees were told that they would not appear in the final cut of the video, either in speaking or nonspeaking roles, unless they gave their written consent, and that they would be deleted from the video if they desired. Bridges instructed the other managers to give the employees the same information.

After the completion of the videotaping each individual who appeared in the video in a nonspeaking role, whether a unit employee or other nonunit employee such as a casino worker, was identified. Thereupon the individual was approached by a manager and was told that he or she appeared in a procompany video which would be shown to unit employees prior to the election, and that it would be necessary to sign a consent form in order to remain in the final version of the video.

The form, entitled ''CONSENT TO BE PHOTOGRAPHED'' is as follows:

> The Flamingo Hilton Reno is preparing a videotape that includes pictures of you and several of your coworkers. We intend to use the videotape as part of communicating the Company's position regarding the union organization campaign, and we would like to include your picture in it. If you have no objection, please sign this form and return it to Mary Bryant in Casino Marketing.
>
> We are *not* asking you to tell us whether you support or oppose the union in the election. We are simply requesting your permission to use your picture in the videotape. Whether you decide to include you picture or not in the videotape is completely up to you and will have no effect on your job. [Emphasis in original.]
>
> I consent to the Company's use of my picture in its videotape.
>
> _____
>
> Signature of Employee Date

The ''CONSENT TO USE VIDEO'' form which was signed by those employees who had speaking roles in the video is as follows:

> The Flamingo Hilton-Reno is preparing a videotape that includes footage of you and several of your coworkers expressing your feelings about the union activity at the Flamingo Hilton-Reno. We intend to use the videotape as part of communicating the company's position regarding the union organization campaign and would like to include your videotaped image in it. If you have no objection, please sign and date this form.
>
> I consent to the use of my videotaped image in the company's video.
>
> _____
>
> Name Date

C. *Analysis and Conclusions*

It is well settled that during the pendency of election objections an employer acts at its peril in refusing to deal with a union that has prevailed in a representation election. Where the election objections are ultimately overruled and the

Board certifies the union as the exclusive collective-bargaining representative of the unit employees, as is the case here, the employer violates Section 8(a)(5) of the Act by its refusal to consult and deal with the Union during the interim period between the date of the election and the date of certification regarding matters customarily encompassed by the collective-bargaining process. *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974). Thus, the Board stated in *O'Connor* as follows:

> The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes. [Citations omitted.]

As set forth above, the Board has overruled the election objections and has certified the Union. Further, in the instant proceeding, the Respondent has elected to rely on its argument that it has no duty to recognize and bargain with the Union because of the Union's alleged noncompliance with certain Nevada State Statutes regulating unions in the performance of their representation of casino gaming employees, and has not presented any other defense to the complaint allegations. Accordingly, I find that the Respondent has violated Section 8(a)(5) and (1) of the Act by its conduct, as alleged in the complaint, that occurred during the period that the election objections were pending, namely, from about August 18, 1994, to February 22, 1995. Thus, as more fully set forth above, by refusing to consult and deal with the Union regarding the laying off of employees, by the transferring of bargaining unit work outside the unit, by the making of unilateral changes in terms and conditions of employment including the changing of work hours and/or workdays and the granting of wage increases,[2] by the Respondent's failure to provide requested relevant information to the Union which is germane to the aforementioned unilateral changes, and by refusing to discuss grievances regarding employees who have been effected by the unilateral changes, all of which conduct occurred during the pendency of the Respondent's election objections, the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act.

I credit the testimony of employee Silvia Cruz, and find that Supervisor Hsiao warned her that she could get in trouble by wearing a union button and that this could cause her problems. Although it appears that she was aware of the Respondent's policy to permit the wearing of prounion buttons during the election campaign, this does not negate the fact that she reasonably understood that her relationship with Hsiao, and therefore the Respondent, could suffer if she disregarded his admonition. Accordingly, I find that by such conduct the Respondent has violated Section 8(a)(1) of the Act. See *Blue Grass Industries*, 287 NLRB 274, 285–286 (1987).

Further, I credit the testimony of Cruz regarding Hsiao's statement to the group of buffet employees about 2 weeks after the election. Thus, I find that Hsiao told the group that, in effect, the Union could not do anything for them for several years, and that during this period they could be summarily laid off and the Union would be of no assistance. Contrary to the position of the Respondent, I do not conclude that Hsiao's remarks were merely a nonthreatening prediction of the realities of Board processes.[3] Rather, Hsiao went well beyond the permissible bounds of responding to employees that such matters take time. Thus, he replied in a manner which displayed his obvious antagonism toward the Union, and told employees that they had good jobs and that the Union could not do anything for them; that if the Company wanted to lay them off quickly the Union could not do anything about it and the employees could end up without work; that it would take about 2 or more years for the Union to get in and be able to do something for the employees; and that the Company could fire the employees at any time and the Union could do nothing for them. By such comments designed to impress on the employees the futility of having selected the Union as their collective-bargaining representative, the Respondent has violated Section 8(a)(1) of the Act. *Marshall Durbin Poultry Co.*, 310 NLRB 68, 74 (1993); *Airtex*, 308 NLRB 1135 (1992).

Moreover, I find without merit the Respondent's further contention that Hsiao's remarks were noncoercive in nature because they were made after the election. Clearly, remarks of this nature would reasonably have an inhibiting effect on employees' continued activity in supporting the Union's efforts following the election particularly where, as here, the Respondent was simultaneously taking the position, in violation of Section 8(a)(5) and (1) of the Act, that it had no obligation to confer and discuss matters with the Union.

I credit the unrebutted testimony of employee Byron Gonzalez who was asked by Supervisor Emerson Kimball why he was wearing a ''Union Yes'' button. Thereafter, although Gonzalez understood that the wearing of such union buttons was permissible, he decided to remove it because he ''felt fear'' as a result of the tone of voice in which Kimball interrogated him. In the absence of any contrary testimony, I find that the circumstances surrounding this instance of interrogation were coercive in nature, and I accordingly find that by such conduct the Respondent has violated Section 8(a)(1) of the Act. *Fairfax Hospital*, 310 NLRB 299 (1993).

Gonzalez also testified that the day after the election he overheard Alfredo Eyzaguierre, food and beverage shift supervisor, ask a new female bartender, Donna, why she was wearing a ''Union Yes'' button. Donna replied, according to Gonzalez, that she was wearing the button because she liked it. Although Supervisor Eyzaguierre did not testify in this proceeding, I find that the testimony of Gonzalez is not sufficient to demonstrate that this instance of interrogation was coercive in nature; there is no evidence to indicate that the remark was other than a casual question to a union adherent who was openly demonstrating her support for the Union by wearing a union button, and Eyzaguierre's question was un-

[2] Regarding the granting of wage increases to certain unit employees, the Respondent presented evidence in support of its contention that the wage increases were in the process of being implemented prior to the election. However, the evidence clearly does not support this contention, and the Respondent does not continue to advance this argument in its brief.

[3] See *Mantrose-Haeuser Co.*, 306 NLRB 377, 378 (1992).

accompanied by any indicia of coercion. I shall dismiss this allegation of the complaint.

I credit the testimony of employee Herlinda Carvajal and find that in June 1994, prior to the election, she was required to open her locker so that its contents could be inspected by the Respondent's security guard and Housekeeping Manager Irma Herbert who were looking for union material that Carvajal was apparently suspected of passing out during working time. During the incident Carvajal was told that she had been causing a lot of problems and ''had a bad record downstairs,'' and was also told that she should only distribute campaign propaganda outside the casino rather than during breaks and in the locker room. The affidavit of Irma Herbert is clear that Carvajal was so admonished, because she wanted Carvajal to stay out of trouble. Carvajal denied that she had violated the Respondent's rules regarding the distribution of campaign material, and the Respondent has presented no evidence indicating that Carvajal had distributed campaign literature during working time or in impermissible areas of the premises. Accordingly, I find that by searching the locker of Carvajal, by admonishing her, in effect, that her continued union activity could result in adverse repercussions, and by directing her to confine her continued distribution of literature to locations outside the Respondent's premises, the Respondent has violated Section 8(a)(1) of the Act. *Nashville Plastic Products*, 313 NLRB 462 (1993); *Perth Amboy Hospital*, 279 NLRB 52 (1986).

I do not find that the Respondent has violated the Act by requesting employees to sign the ''Consent to be Photographed'' forms. It was made very clear to the employees that they did not have to appear in the procompany video and that they could do so or not without fear of any adverse repercussions by the Respondent. There is no contention that the Respondent did not have a right to produce the video for purposes of setting forth its position regarding the forthcoming election,[4] and it appears under the circumstances that the manner in which the Respondent went about obtaining the consent of the employees was noncoercive in nature. Indeed, the consent form itself declared that by agreeing to appear in the video, ''We are *not* asking you to tell us whether you support or oppose the union in the election.'' (Emphasis in original.) Moreover, the images of the employees who are waving at the camera or performing their work are noncommittal in regard to their union adherence, and do not indicate whether or not a particular employee supports either the Union, the Respondent, or neither of the two.

However, the General Counsel and the Union take the position that the video itself is procompany in its conception and purpose, and that it is per se coercive for an employer to request permission from employees to use their image in procompany campaign material as this is tantamount to asking them to declare whether they are for or against the Union. I disagree. This per se approach, in effect, would appear to effectively deprive employers of their right to produce campaign videos that portray employees performing their work or otherwise appearing to enjoy the camaraderie of their coworkers and would be, in my opinion, an improper encroachment on an employer's right, under Section 8(c) of the Act,[5] to convey its message through whatever media it desires. Further, in addition to the fact that Board precedent requires that an employer must first obtain employees' permission to use their image in campaign videos,[6] the Respondent did have a further legitimate reason for asking employees to sign consent forms, namely, this was a past practice that pertained to all individuals appearing in the Respondent's advertising videos and publications, and was instituted prior to the advent of the Union for the purpose of protecting the Respondent from potential liability. Thus, under all the circumstances, including the manner of usage of the employees' images in the video, the wording of the consent form, the Respondent's past practice, and the scope and nature of the violations found here, I find that the unit employees who were asked to sign consent forms if they wanted to appear in the video could reasonably conclude that the Respondent was not attempting to discern their feelings for or against the Union. I shall therefore dismiss this allegation of the complaint.

It is also contended that the Respondent improperly approached employees in order to ascertain whether they would agree to express their views regarding the Union and/or the Respondent in the procompany video. The evidence shows that the Respondent approached employees who, by various means, had made their procompany feelings openly apparent to supervisors and coworkers, and the General Counsel has presented no witnesses in support of the contention that such employees were coercively interrogated regarding their union sympathies or were induced to give procompany testimonials out of fear of adverse consequences in the event they refused. I shall therefore also dismiss this allegation of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time hotel employees employed by the Respondent at its 225 North Sierra Street facility in Reno, Nevada; excluding all gaming department employees, engineering department employees, general and administrative department employees, marketing department employees, entertainment department employees, managerial and confidential employees, professional employees, employees represented for collective bargaining by other labor organizations, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been the exclusive collective-bargaining representative of the employees in the appropriate unit within the meaning of Section 9(a) of the Act.

5. The Respondent has violated Section 8(a)(1) and (5) of the Act as found.

6. The unfair practices set forth above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

[4] Videos produced by both employers and labor organizations have become a relatively common form of communication during the course of election campaigns.

[5] This is not to say that employers' motives in this regard should not be subject to a case-by-case factual analysis.

[6] See *Sony Corp. of America*, 313 NLRB 420 (1993).

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (5) of the Act, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act, including the posting of an appropriate notice attached hereto as ''Appendix.''

The Respondent shall be required to bargain in good faith with the Union regarding the laying off of employees, the transferring of bargaining unit work outside the unit, and the unilateral changes in terms and conditions of employment including the changing of work hours and/or workdays and the granting of wage increases; further, the Respondent shall be required to discuss with the Union the grievances of the employees named here, and to provide all the requested information to the Union. In addition, the Respondent shall be required to make whole, with interest, any employees who have sustained monetary damage as a result of the Respondent's failure and refusal to timely consult in good faith with the Union regarding layoffs, the transferring of work outside the bargaining unit, the changing of working hours and working days, and the grievances of the named employees. See *Mike O'Connor Chevrolet*, infra. Backpay is to be computed in accordance with the Board's decision in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]